

**Before the
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
And
DEPARTMENT OF AGRICULTURE
Rural Utilities Service**

In the Matter of)	
)	
American Recovery and Reinvestment Act)	
of 2009 Broadband Initiatives)	Docket No. 090309298-9299-01
Joint Request for Information)	

COMMENTS OF OPEN RANGE COMMUNICATIONS INC.

Jeffery R. Leventhal, Esq.
General Counsel
Open Range Communications Inc.
8100 East Maplewood Ave
Suite 200
Greenwood Village, CO 80111

Joe D. Edge, Esq.
Drinker Biddle & Reath LLP
1500 K Street, NW
Suite 1100
Washington, DC 20005

November 30, 2009

SUMMARY

Open Range Communications, Inc. (“Open Range”) here by submits comments on the Request for Information issued by the Rural Utilities Service and National Telecommunications and Information Administration in connection with the issuance of the agencies’ second round Notice of Funds Availability (Second NOFA) under the Recovery Act. Open Range is presently constructing a rural wireless broadband network that will serve 546 communities in 17 states. Open Range is also an applicant for a loan under the RUS Broadband Initiatives Program (BIP) pursuant to the terms of the first round Notice of Funds Availability (First NOFA). Open Range submits comments based on its experience with the application process under the First NOFA and addresses a number of policy matters raised by the agencies’ Request for Information.

Open Range suggests a number of improvements to the application process. In addition, Open Range provides recommendations regarding the types of information the agencies should solicit as well as the definitions of service areas to be used and the confidentiality of information submitted.

Regarding the policy issues identified in the Request for Information, Open Range does not recommend adding additional metrics to the application review process. Open Range does propose the use of a modified rating scale which would award applicants greater credit for leveraging outside resources. Open Range believes that the agencies can promote economic development by insuring that projects cover the greatest number of users per dollar expended and that projects for targeted populations should be sustainable in the long run. Regarding program definitions, speed thresholds should be technology dependent and the remote area designation should only be a factor in considering applications where grant funds are requested. Where the

agencies base decisions upon the presence of services by incumbent providers, applicants should be given an opportunity to respond to information regarding the availability of incumbent services. The interconnection and nondiscrimination requirements applicable to loan and grant recipients should be aligned with those to be adopted by the FCC so that the entire broadband industry is subject to a common set of guidelines.

The Recovery Act precludes certain types of duplicative government funding. Consistently, the RUS should decline to fund projects for areas which are already funded under the preexisting RUS broadband program. Finally, the agencies should clarify the role of state review in the decision making process, particularly in those cases where governmental entities are also applicants for funding.

TABLE OF CONTENTS

	Page
I. The Application and Review Process	2
A. Streamlining the Applications.....	2
1. New Entities.....	4
2. Consortia and Public-Private Partnerships.....	4
3. Specification of Service Areas.....	4
4. Relationship between BIP and BTOP.....	5
B. Transparency and Confidentiality.....	5
C. Outreach and Support	5
D. NTIA Expert Review Process.....	6
II. Policy Issues Addressed in the NOFA.....	6
A. Funding Priorities and Objectives.....	6
1. Middle Mile “Comprehensive Community” Projects.....	6
2. Economic Development.....	7
3. Targeted Populations	8
B. Program Definitions.....	8
C. Public Notice of Service Areas.....	9
D. Interconnection and Nondiscrimination Requirements	9
E. Sale of Project Assets.....	11
F. Cost Effectiveness.....	11
G. Other	11
1. Duplicative RUS Loans	11
2. Priority for Title II Borrowers.....	12
3. The State Review Process.....	12
III. Conclusion	13

**Before the
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
And
DEPARTMENT OF AGRICULTURE
Rural Utilities Service**

In the Matter of)	
)	
American Recovery and Reinvestment Act)	
of 2009 Broadband Initiatives)	Docket No. 090309298-9299-01
Joint Request for Information)	

COMMENTS OF OPEN RANGE COMMUNICATIONS, INC.

Open Range Communications, Inc. (“Open Range”) hereby responds to the Joint Request for Information (“Joint Request”) issued by the Department of Agriculture, Rural Utilities Service (“RUS”), and the Department of Commerce, National Telecommunications and Information Administration (“NTIA”), on November 16, 2009 (74 Fed. Reg. 58940, *et seq.*). The Joint Request seeks comment on issues relating to the implementation of the RUS Broadband Initiatives Program (BIP) and the NTIA Broadband Technology Opportunities Program (BTOP) in connection with the issuance of the upcoming second round Notice of Funds Availability (Second NOFA). Open Range applied for an RUS loan under the BIP and the terms of the first round Notice of Funds Availability (First NOFA). Open Range believes that its experience in connection with that process would be useful to the agencies in considering changes for the Second NOFA. Open Range also comments on the policy issues identified in the Joint Request.

Open Range Communications, Inc. was formed to deliver wireless broadband services to rural America. In early 2009, Open Range concluded its funding process for the first phase of its rural broadband network. That network will serve 546 rural towns and communities in 17 states. Open Range is presently constructing the initial markets in that network and recently began providing commercial broadband service in its first five communities. In 2010, Open Range will initiate service in approximately two hundred additional communities and the entire first phase network will be completed within approximately the next four years.

In August, in response to the First NOFA, Open Range submitted a loan application under the RUS BIP. That request sought a loan of \$87 million for the construction of broadband facilities in an additional one hundred sixty seven communities. Open Range anticipates that it will be filing an application in response to the Second NOFA as well. Open Range thus has a particular interest in improvements to the process that will be used and in policy changes that might be applicable to second round applicants. The comments and suggestions of Open Range are set forth in the order that the topics appear in the agencies' Joint Request.

I. The Application and Review Process

A. Streamlining the Applications

Question: In what ways should RUS and NTIA streamline the applications to reduce the burden on applicants, while still obtaining the requisite information to fulfill the statutory requirements set forth in the Recovery Act? Should certain attachments be eliminated, and if so, which ones?

The initial application process could be made more efficient and less burdensome by streamlining the methodology for submitting the required information. First, Open Range found the use of the mapping tool and the upload process for the attachments to be time consuming and cumbersome. The mapping process which was required to submit proposed service areas took a great deal of time and was, at times, unreliable. The web based mapping tool was difficult to use

during regular business hours due to limited server capacity which on several occasions resulted in a system crash and loss of data. In addition, the mechanics of first drawing a service area polygon and then shading the polygon according to the First NOFA definitions of un-served and underserved areas were laborious. Recognizing the need for an evaluative tool to determine BIP eligibility for specific areas, Open Range recommends making the eligibility map layer available for applicants to download. In addition, Open Range recommends adding a feature whereby the applicant can upload the entire proposed service area map layer directly to the web based mapping tool.

The upload process for the attachments was also time consuming and, at times, unreliable. Both the text box fill-ins and the separate uploads could be streamlined for improved efficiency. Again, the limited server capacity was a bottleneck which hindered the ability to view and verify uploaded attachments and the final application PDF. Open Range was unable to view and verify the appearance of the final application PDF before submitting. Additionally, Open Range found the fill-ins on the application to be inconsistent in some cases. For example, in the application guide the Executive Summary length is “not to exceed three pages”. The fill-in box on the application only allows 10,000 characters, or approximately 2 ½ pages.

Open Range does not recommend eliminating any specific attachments, but does recommend modifying a number of them and adopting a single numbering scheme to identify and track the attachments (i.e. letters A-Z.) The attachment “Certification by Professional Engineer” is not applicable to all types of networks. A more general engineering certification is more appropriate in many cases. For example, certification by an RF engineer in the case of a wireless network would be appropriate. The project milestones section of Attachment E is a fill-in and does not provide enough space for the amount of information being requested. In

addition, Open Range recommends increasing the allowable length of Attachments C and E so they do not have to be uploaded as supplemental information.

1. *New Entities*

Question: What type of information should RUS and NTIA request from new businesses, particularly those that have been newly created for the purpose of applying for grants under the BIP and BTOP programs?

RUS and NTIA should request information which demonstrates a sound business plan, project sustainability and reasonableness, external funding commitment and the ability to deploy immediately. Individual track records of the applicants should also be evaluated where possible.

2. *Consortia and Public-Private Partnerships*

Question: Similarly, how should the application be revised to reflect the participation of consortia or public-private partnerships in the application process?

Consortia and public-private partnerships are likely to be new entities as well and thus, as with other new entities, RUS and NTIA should request information which demonstrates a sound business plan, project sustainability and reasonableness, external funding commitment and the ability to deploy immediately. Individual track records of the members or partners in such entities should also be evaluated where possible.

3. *Specification of Service Areas*

Question: What level of data collection and documentation should be required of applicants to establish the boundaries of the proposed funded service areas?

The service area boundaries should be defined according to a standardized measure such as zip code, city boundary or census block. A standardized definition allows for greater accountability for both the applicant and the incumbent providers in the proposed service areas. By utilizing a standard definition for a service area, applicants can more easily collect business and critical community facility counts via readily available data sources which can be verified

during the review process. Although more cumbersome, requiring the census block level as a service area delineator has the added benefit of forcing incumbents to disclose more detailed network and service level data in their applicant response. This information can also be used to enhance broadband availability maps.

4. *Relationship between BIP and BTOP*

Question: Are there situations where it is better to give a loan to an applicant as opposed to a grant? Are there applicants for which a loan would not be acceptable, and if so, how should the programs consider them?

The choice between the loan and grant programs should be made in the first instance by the applicant based upon the objectives of the project and the criteria for the program. In cases where RUS determines that a loan is infeasible for economic reasons it may wish to consider whether the project would be viable with grant funding.

B. *Transparency and Confidentiality*

Question: Should the public be given greater access to application data submitted to BIP and BTOP? Which data should be made publicly available and which data should be considered confidential and proprietary?

Financial, technical and other confidential information should be treated as confidential if such treatment is requested by the applicant. The programs should respect the confidentiality of these data and exercise caution by posting only redacted versions of documents containing sensitive information.

C. *Outreach and Support*

Question: What method of support and outreach was most effective? What should be done differently in the next round of funding to best assist applicants?

During the initial stages of the application process support was very limited. Calls and emails to the help desk were not returned and the website provided limited answers to questions.

The application guidance manual was helpful, but could have provided clearer guidance on certain details. For example, the application asks for a CCR number. Open Range had to call the help desk to determine the right number to use from its CCR registration. This number is labeled “CAGE” on the CCR document, but there was no way of knowing this from the instructions provided. Support levels were much improved by the end of the process with good response times from the help desk and timely postings to the website.

D. NTIA Expert Review Process

Question: To further the efficient and expeditious disbursement of BTOP funds, should NTIA continue to rely on unpaid experts as reviewers? Or, should we consider using solely Federal or contractor staff?

Open Range did not apply for BTOP funding but understands that applicants who did may have concerns regarding the use of outside reviewers in screening applications.

II. Policy Issues Addressed in the NOFA

A. Funding Priorities and Objectives

Question: RUS and NTIAA request commenters that are proposing a more targeted approach for round 2 projects to support their proposal with quantitative estimates of the projected benefits of adopting such an approach.

Open Range does not recommend adding new metrics to the proposal requirements or adopting a more targeted approach for round 2 projects. Round 1 requirements adequately address the need to quantify the projected benefits of applicant proposals. Specifically, the data submitted regarding number of end users reached, number of jobs created, and number of businesses and critical community institutions passed adequately quantify the impact of a proposed project.

1. Middle Mile “Comprehensive Community” Projects

Question: Should we give priority to those middle mile projects in which there are commitments from last mile service providers to use the middle mile network to serve end users in the community?

In order to maximize the potential impact of Federal funds, middle mile applicants should clearly state the projected benefits mentioned above for each proposed middle mile link.

Applicants should be evaluated based on a number of criteria including, but not limited to demonstrating a sound business plan, project sustainability and reasonableness, external funding commitment and the ability to deploy immediately. Commitments from last mile providers should weighed along with these other evaluation criteria.

The first round point system awarded up to 10 points for the leveraging of outside resources on the following scale:

- (i) 10 points if the ratio is greater than 100%
- (ii) 7 points if this ratio is between 100% and 75%
- (iii) 5 points if this ratio is between 75% and 50%
- (iv) 3 points if this ratio is between 50% and 25%
- (v) 1 point if this ratio is lower that 25%

Open Range recommends a modified scale which would enable applicants to earn more points for leveraging outside resources in the two lower ranges covering up to 50%. The first round point system also awarded up to ten points for the extent of grant funding requested, with a zero grant funded application earning the maximum possible point score. Because this will maximize the impact of available resources Open Range supports this evaluation approach and recommends keeping it in place in assessing future applications.

2. *Economic Development*

Funds made available to promote a regional economic development approach to broadband deployment need to be allocated in a manner that is consistent with the objectives of the Recovery Act, i.e. to expand access to broadband services in the United States. Funds should be allocated to projects resulting in the highest number of households, businesses and critical community facilities passed per dollar spent.

3. *Targeted Populations*

With regard to specific targeted populations, funds should be allocated to projects that are sustainable in the long term. Additional funds should be targeted to projects such as Public Computer Centers and Sustainable Broadband Adoption projects where there is a proven source of funds to cover the continuing operating expenses associated with providing ongoing broadband services to these locations. For example, funds allocated for infrastructure build-outs to schools and libraries should be closely tied to e-Rate funding or an alternate demonstrated source of ongoing funding to support operating expenses.

B. Program Definitions

Speed thresholds should be defined according to the type of project being funded. Last mile applications proposing to serve residential subscribers should have a different speed threshold than middle mile applications proposing to serve anchor institutions, businesses and last mile service providers. Similarly, portable wireless applications should have different speed thresholds than wireline applications.

The remote area designation should only be a factor in determining award decisions for grant and grant/loan applications. The original intent of the First NOFA in adopting its definition of “remote” was to enable communities in this category to be eligible for 100% grant

funding. In actuality, the inclusion of “remote” markets in a project was awarded up to five points (one point per market.) These points were included in the scoring criteria for all applications, regardless of whether the proposed project was 100% loan funded or not. Open Range recommends removing this scoring criterion from the process entirely for applicants requesting 100% loan funding.

C. Public Notice of Service Areas

Existing broadband service providers must be held accountable for substantiating the existence of broadband service in an applicant’s proposed service area. Where possible, data from the state broadband mapping program should be used to verify served and un-served areas. Incumbents should be required to provide the same level of detail required of applicants (i.e. census block level data) to substantiate their service area claims. RUS and NTIA should publish broadband maps showing areas where the minimum advertised speed threshold of 3 Mbps is satisfied. In addition, RUS and NTIA should conduct due diligence to confirm incumbent claims with determinations made at the census block level. Finally no application should be denied based upon service availability data which an applicant has not had an opportunity to review and respond to.

D. Interconnection and Nondiscrimination Requirements

The First NOFA includes a number of nondiscrimination and interconnection requirements. These were adopted pursuant to the following direction in the Recovery Act to the NTIA Assistant Secretary:

“Concurrent with the issuance of the Request for proposal for grant applications pursuant to this section, The Assistant Secretary shall, in coordination with the Commission, publish the non-discrimination and network interconnection obligations that shall be contractual conditions of grants awarded under this section, including at a minimum, adherence to the principles

contained in the Commission's broadband policy statement (FCC 05-15, adopted August 5, 2005)."

There is no similar direction to the RUS Assistant Secretary respecting the BIP grant and loan programs.

At the time the First NOFA was issued on July 9, 2009 the FCC had not updated or revised its 2005 "broadband policy statement" referred to in the sections of the Recovery Act establishing the NTIA BTOP. However the FCC was charged in the Recovery Act with the development of a "National Broadband Plan". As part of that effort the FCC is conducting an extensive series of rulemaking proceedings and has issued a Notice of Proposed Rulemaking addressing the development of specific rules which would constitute a "Federal Internet Policy".

See *Preserving the Open Internet, Broadband Industry Practices, Notice of Proposed Rulemaking*, GN Docket No. 09-191, released October 22, 2009 ("*Open Internet NPRM*").

Pursuant to the *Open Internet NPRM*, the FCC intends to adopt rules regarding, *inter alia*, nondiscrimination, reasonable network management, access to applications, services and devices, disclosure and other matters. The FCC is expected to rule on this matter quickly – likely before significant deployments occur under the Recovery Act.

It would make little sense for broadband providers funded under the Recovery Act to be subject to different rules and policies regarding nondiscrimination and interconnection than the remainder of the broadband industry. It would likewise make little sense for broadband providers which have networks funded under the Recovery Act operating alongside networks not receiving such funding to be subject to different rules in different parts of their networks. The FCC has substantial experience amounting to some 65 years administering network nondiscrimination and interconnection principles for the telecommunications industry. The FCC can be expected to apply this experience in fashioning rules for the entire broadband industry. Open Range urges

that RUS and NTIA determine that the rules and policies incorporated in the FCC's Federal Internet Policy will apply to grant and loan recipients under the Recovery Act in place of the NOFA requirements at such time as the FCC rules and policies become effective.

E. Sale of Project Assets

This rule should be revised to be consistent with existing USDA guidelines. The rule was unclear with respect to its applicability to loans or loan/grant combinations. The rules set forth in the NOFA should apply only to the extent that project assets are funded via grants.

F. Cost Effectiveness

RUS should consider the capital efficiency of each proposal by taking into account the cost in each case of covering an additional prospective broadband subscriber. Thus, for example, if the capital cost per additional prospective subscriber covered in one proposal is \$300 while the capital cost per additional prospective subscriber covered in another is \$900 the first proposal would be three times as efficient in delivering broadband services to the maximum number of subscribers per dollar of funding. Accounting for capital efficiency in this way will enable RUS to maximize the impact of available funding and ensure that broadband services are available to the greatest number of rural subscribers.

G. Other

1. Duplicative RUS Loans

The Recovery Act provides that projects funded by RUS under the BIP may not also receive funding under the NTIA BTOP. Similarly the Recovery Act also precludes "unjust enrichment" arising from the funding of BTOP project recurring costs through another federal program such as the RUS BIP or the preexisting broadband loan program. Consistent with these policies Open Range believes that RUS should take into consideration existing RUS loan

markets in evaluating new projects in order to avoid duplicative funding which reduces the effectiveness of the program. Open Range has secured RUS funding to build wireless networks in 518 rural and underserved markets. These markets are currently in various stages of deployment, with a commitment to offer service to 90% of the markets by the end of 2012. Allocating stimulus funds to these fully funded Open Range markets would not be consistent with maximizing the impact of Recovery Act funds spent to provide increased access to broadband in rural areas across America.

2. Priority for Title II Borrowers

Open Range also urges RUS to afford lesser priority to projects proposed by borrowers and former borrowers under Title II of the Rural Electrification Act of 1936. These are entities that have received RUS loans in the past for the construction of telephone facilities. When the Broadband Loan Program rules were first adopted in January 2003, RUS provided an exclusivity period lasting until October 1, 2004 for RUS borrower telephone companies that wished to apply for a broadband loan. Some companies took advantage of the exclusivity period and many did not. Since that time telephone company borrowers have been able to apply for broadband loans at will. Because RUS funding has never been exhausted it appears that all RUS telephone company borrowers which desired broadband funding from RUS have been able to apply for it. Thus little purpose would be served by affording substantial priority to such applicants now.

3. The State Review Process

The states were asked to participate in reviewing all of the applications for their states and submit their recommendations to the NTIA. It is not clear what role these reviews are playing in the NTIA and RUS final selection process. It is also not clear how any such reviews

and recommendations will be shared with applicants, especially where they might lead to adverse action on an application.

Open Range's last mile application encompasses service areas in ten different states. Of those ten states, only one state requested a detailed breakdown of the Open Range project as it relates to proposed service areas located within that state. Without this information, it would be very difficult for any state to meaningfully evaluate and recommend a specific proposal.

This method of review presents cause for concern for both the states themselves as well as for the applicants. The states were allowed a very limited amount of time to analyze a large number of applications. Some states might not have adequate resources in place to assist them with the technological analysis required to make well considered recommendations within the timeframe provided. Furthermore, asking the states to participate actively in the review process creates a potential conflict of interest in any case where applications are also filed by public/private partnerships that include state entities.

III. Conclusion

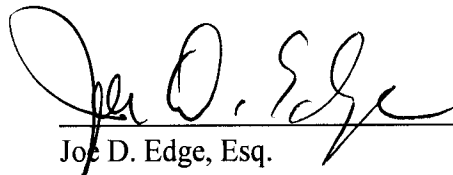
Open Range commends the Agencies for the extraordinary effort they have undertaken to implement the terms of the Recovery Act as it pertains to the deployment of broadband services. The magnitude of the task is daunting and the time allowed for completion of the program is extraordinarily short. Open Range hopes that these comments are useful to the agencies as they prepare to issue the Second NOFA and receive the next round of grant and loan applications. Open Range intends to play a key role in the deployment of broadband services in rural areas and Open Range believes that the RUS and NTIA programs can have an important positive impact in

the overall effort to ensure that every American has the opportunity to benefit from the broadband revolution.

Respectfully Submitted,

Open Range Communications, Inc.

By its attorneys,

A handwritten signature in black ink, appearing to read "Joe D. Edge", is written over a horizontal line.

Jeffery R. Leventhal, Esq.
General Counsel
Open Range Communications Inc.
8100 East Maplewood Ave
Suite 200
Greenwood Village, CO 80111

Joe D. Edge, Esq.
Drinker Biddle & Reath LLP
1500 K Street, NW
Suite 1100
Washington, DC 20005

November 30, 2009